

**OCT 18 2005**

**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DALE ALAN JOHNSON,

Defendant - Appellant.

No. 04-36056

D.C. Nos. CV-04-00068-DWM  
CR-02-00003-DWM

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Montana  
Donald W. Molloy, District Judge, Presiding

Submitted October 11, 2005<sup>\*\*</sup>

Before: T.G. NELSON, WARDLAW and TALLMAN, Circuit Judges.

Federal prisoner Dale Alan Johnson appeals the district court's denial of his  
28 U.S.C. § 2255 motion to vacate or correct his sentence for possession of

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<sup>\*</sup> This disposition is not appropriate for publication and may not be  
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without  
oral argument. *See* Fed. R. App. P. 34(a)(2).

methamphetamine with intent to distribute. Under *United States v. Booker*, 125 S. Ct. 738 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), Johnson contends that the district court erred in enhancing his sentence based on judge-found facts. Johnson's conviction was final as of the dates the *Booker* and *Blakely* decisions were issued. Johnson's claim is foreclosed because, as we recently held, "*Booker* does not apply retroactively to convictions that became final prior to its publication." *United States v. Cruz*, No. 03-35873, 2005 WL 2243113, at \*1 (9th Cir. Sept. 16, 2005). *See also, Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005) (holding in a 28 U.S.C. § 2254 habeas action that *Blakely* does not apply retroactively to cases on collateral review). Consequently, we affirm the district court.

**AFFIRMED.**